STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 10, 2005
v	No. 253248 Oakland Circuit Court
ELLIOTT JEROME JAMES, Defendant-Appellant.	LC No. 2003-191406-FH

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), breaking and entering a building with intent to commit a larceny therein (B&E), MCL 750.110, and unlawfully driving away an automobile (UDAA), MCL 750.413. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of ten to thirty years' imprisonment for each of the convictions. Defendant appeals as of right, raising only sentencing issues in his primary appellate brief. In defendant's supplemental Standard 11 brief,[1] he challenges the validity of the arrest warrant and asserts prosecutorial misconduct for the prosecutor's alleged failure to disclose the nature of any agreement with an accomplice who testified on the state's behalf and against defendant. We affirm.

This case arises out of multiple criminal acts, including a home invasion in which defendant and his accomplice, Daniel Carpenter, entered an occupied home without permission at around 5:00 a.m. on June 13, 2003, and removed a purse that contained a wallet, cell phone, credit cards, cash, a checkbook, and keys. Defendant and Carpenter proceeded to drive to a gas station, purchased gas and other items with the stolen cash, and hatched a plan to break into an adjacent party store to steal cigarettes.[2] But before committing the B&E, they returned to the scene of the home invasion to steal an automobile that was sitting in the driveway. Defendant

[1] Pursuant to Administrative Order No. 2004-6, Standard 11 briefs are now to be referenced as Standard 4 briefs.

[2] Video surveillance tapes from the gas station produced still photographs showing defendant and Carpenter at the gas station shortly before the B&E at the party store, which was located next door.

and Carpenter planned to utilize the vehicle in perpetrating the B&E at the store. Because the keys to the vehicle were in the purse stolen from the home, defendant and Carpenter had no difficulty in taking the car. Next, they made a stop to grab a brick and garbage can for use in the B&E. They then went to the party store where defendant smashed a glass door with the brick, gained entry, removed about sixty cartons of cigarettes, and stuffed the cartons in the garbage can. Carpenter acted as the lookout while defendant accomplished the larceny. The two thieves then absconded with the stolen goods. Defendant was later apprehended, as well as Carpenter, and Carpenter eventually testified against defendant at trial. Other witnesses who testified against defendant included the victims of the home invasion, a neighbor who saw two individuals running in the area, the gas station attendant, the party store owner, and a detective. Defendant spoke with police and did not admit or concede guilt; however, he was caught in several lies and made some incriminating remarks. Defendant did not call any witnesses to testify in his defense.

Defendant first argues that the trial court erred in sentencing him as a fourth habitual offender. Directly after the jury returned its verdict of guilty on all three charges, the court queried defendant regarding his past convictions. Defendant acknowledged a 1991 felony B&E conviction and a 1986 felony conviction for unlawful use of a motor vehicle. When the trial court asked him about a 1988 felony conviction for attempted B&E, defendant claimed he could not recall any such conviction. The court stated that the existence or nonexistence of the 1988 conviction would be addressed at sentencing. Our review of the transcript of the sentencing hearing reveals that the court did not directly address the 1988 conviction. Defendant was sentenced as a fourth habitual offender. Defendant contends that the trial court erred in failing to address and determine whether he actually had three prior felony convictions as required by MCL 769.13. We disagree.

The presentence investigation report (PSIR) indicates that defendant indeed had a 1988 B&E conviction, as well as the convictions alluded to by the trial court following the verdict and acknowledged by defendant, along with additional theft-related convictions dating back to 1981. Defendant has an extensive adult criminal history. For purposes of sentence enhancement predicated on a defendant's habitual offender status, the existence of a prior conviction may be established by information contained in the PSIR. MCL 769.13(5)(c). At sentencing, defense counsel stated, "Judge, I have reviewed the presentence recommendation. I've allowed my client an opportunity to go over it as well. I believe it to be accurate. I do not have any corrections, additions, or deletions."

Although the trial court may have been obligated to conduct a hearing and render a specific determination with regard to the existence of the 1988 conviction pursuant to MCL 769.13(5) and (6) if matters had stood as they were left following the court's questioning of defendant after trial, the subsequent issuance of the PSIR reflecting the convictions necessary for enhancement as a fourth habitual offender negated the need for any further discussion of the matter after defendant agreed that the PSIR was accurate.[3] There were no inaccuracies or

[3] We also note that defendant failed to file a written motion challenging the enhancement notice as provided in MCL 769.13(4).

challenges to resolve at sentencing as the court and defendant accepted the information contained in the PSIR. Reversal of the sentences is unwarranted.

Defendant next argues, on various grounds, that the court erred in sentencing defendant to prison terms of ten to thirty years for the convictions. The crimes were committed in June of 2003; therefore, the legislative sentencing guidelines apply to this case. MCL 769.34(2); *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004). Here, the sentencing guidelines range was 84 to 280 months,[4] and thus defendant's minimum sentence (120 months) falls well within the guidelines. We also note that the court had the ability to issue consecutive sentences because of the first-degree home invasion conviction, but it declined to do so. See MCL 750.110a(8).

Defendant argues that the court added time to the minimum sentence as punishment for defendant's refusal to enter a plea under a proposed *Cobbs* agreement[5] that would have provided for a sentence of eight to thirty years' imprisonment. Defendant further argues that the trial court failed to give any explanation regarding why it imposed thirty-year maximum sentences. Next, defendant argues that he has strong family support, which is an important measuring factor in regard to an offender's rehabilitative potential. In conjunction with this argument, defendant asserts that the court should have conducted an assessment of defendant's rehabilitative potential through intensive alcohol, drug, and psychiatric treatment and that the PSIR woefully failed to address such matters. Finally, defendant argues that his sentences constitute cruel and unusual punishment under the United States and Michigan constitutions. We reject defendant's arguments.

A sentence that falls within the guidelines range shall be affirmed on appeal absent a scoring error or reliance on inaccurate sentencing information. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Defendant does not argue that there was a scoring error, nor does he claim that the court relied on inaccurate sentencing information in imposing sentence. Accordingly, we are mandated to affirm. Moreover, any claim that the PSIR was somehow deficient was effectively waived by defendant when counsel affirmatively approved of the report. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Additionally, the record does not support the contention that the trial court acted inappropriately relative to defendant's argument predicated on a proposed *Cobbs* agreement.[6] Defendant's arguments focusing on his rehabilitative potential simply have no bearing on our review of the court's sentencing decisions because the sentence fell within the guidelines, and defendant cites no supporting authority to the contrary. In regard to the cruel and unusual punishment argument, a sentence that falls within the applicable guidelines range is presumptively proportionate, *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996), and a proportionate

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[4] Only the guidelines range for home invasion, the greater offense, was calculated.

[5] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[6] Furthermore, "[t]he judge's preliminary evaluation of the case does not bind the judge's sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources." *Cobbs, supra* at 283.

sentence does not constitute cruel and unusual punishment, *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Defendant's sentencing resulted in application of the lower end of the guidelines and imposition of concurrent terms only. The sentences were proportionate in light of the circumstances surrounding the offense and the offender. In no manner are the sentences cruel and unusual. Finally, with respect to the thirty-year maximum, defendant is a fourth habitual offender, and because first-degree home invasion, B&E with intent to commit a larceny, and UDAA are all punishable upon a first conviction by imprisonment for maximum terms of twenty years, ten years, and five years respectively, the trial court had the authority under MCL 769.12(1)(a) to set the maximums at life or a lesser term of years. See MCL 750.110a(5); MCL 750.110; MCL 750.413. Therefore, the thirty-year maximum sentences imposed by the court are permissible, and defendant cites no authority to support his position that the court must provide an explanation concerning why it imposed a particular maximum sentence allowable under MCL 769.12.

Defendant next argues that the prosecutor engaged in misconduct when he failed to disclose on request the nature of any deal with Carpenter that secured Carpenter's testimony against defendant. Issues of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). We first note that, contrary to defendant's argument, the record does not contain a discovery request for the information, and there is no indication that any objection or motion arose from a failure to reveal the information. Thus, the issue was not preserved for appeal. Accordingly, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). On direct examination, Carpenter testified that he pled guilty to all of the offenses for which he was charged,[7] that no charges were dismissed, and that he was sentenced to prison. On cross-examination, Carpenter testified that he was awaiting sentencing in other cases and was hoping for beneficial treatment because of his cooperation and testimony against defendant in this case. But he emphasized that the prosecutor made no promises whatsoever. Defendant does not make a claim that an actual deal was struck inconsistent with and contrary to Carpenter's testimony. The record fails to reveal any prosecutorial misconduct, nor is there any evidence of prejudice where the jury was fully informed. There was no plain error affecting defendant's substantial rights.

Finally, defendant argues that he was illegally arrested pursuant to an invalid arrest warrant and that the trial court thus did not acquire jurisdiction over him. This argument contained in the Standard 11 brief, which was not preserved and arguably waived, and lacks merit. The record contains a sworn complaint and an arrest warrant that appear to be in full compliance with MCL 764.1a, contrary to defendant's myriad arguments. Even if the arrest warrant is deemed defective, it did not divest the trial court of jurisdiction to try the offenses, where jurisdiction was acquired over defendant after he was properly bound over to the trial court following the preliminary examination in the district court. See *People v Burrill*, 391 Mich 124, 127-128, 132-134; 214 NW2d 823 (1974)(invalidity of arrest warrant does not oust the circuit court of jurisdiction; sanction for invalid arrest warrant is suppression of evidence

[7] These charges mimicked those brought against defendant.

obtained from person);[8] *People v Curtis*, 389 Mich 698, 707; 209 NW2d 243 (1973)(circuit court acquires jurisdiction upon making of a proper return from the magistrate before whom the defendant had been examined or waived examination); *People v Mayberry*, 52 Mich App 450, 451; 217 NW2d 420 (1974). There was more than sufficient evidence establishing probable cause that crimes were committed and that defendant committed the crimes. Reversal is unwarranted.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello

[8] Here, the case hinged on Carpenter's testimony as corroborated by the still photographs derived from the surveillance video and the testimony of others, not on any evidence seized from defendant's person. If any evidence was obtained by way of the arrest, it was not introduced at trial.